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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR ALCANTAR SANCHEZ,

Defendant and Appellant.

B190665

(Los Angeles County
Super. Ct. No. YA058821)

APPEAL from a judgment of the Superior Court of Los Angeles County, William R. Hollingsworth, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Vacated in part, affirmed in part, and remanded with directions.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Sanchez was convicted of second degree murder, for which he was sentenced to state prison for a term of 15 years to life. (Pen. Code, § 187, subd. (a).)¹ Sanchez appeals, contending there was instructional error and challenging a \$10,000 restitution order imposed without a hearing. We vacate the \$10,000 restitution order, remand for a hearing, and otherwise affirm the judgment.

FACTS

Sanchez was in his apartment with his two-year-old son when Virginia Modes (the victim, a frail and elderly neighbor who frequently visited Sanchez's son) entered through the open front door. Sanchez (who had ingested methamphetamines the previous evening) "started tripping," "seeing things," and believed Modes was "attacking" him. He "rushed her" but did not "know what happened after that." As he later told the police, it was "like the devil was in" him. He "started choking her and then [he] let her go and then accidentally . . . , [he] didn't really choke her [but] just [ran] up to her and she started having a seizure . . . and she just passed out." She fell to the floor.

At about that moment, a plumber knocked on the door and when no one responded used a pass key to open the door. Sanchez yelled at him to wait outside, hid Modes's body behind a table, then admitted the plumber and allowed him to check the shower. When the plumber left, Sanchez carried Modes's body to her apartment, then fled to Mexico. Modes's body was

¹ All section references are to the Penal Code.

discovered the next day, and Sanchez was ultimately arrested in Mexico on an unrelated warrant and charged with Modes's murder.

At trial, the People presented evidence of the facts summarized above, including a recording of Sanchez's statements to the police. Sanchez's girlfriend testified that Sanchez had been "fine" when she saw him around lunch time on the day of the murder (which occurred in the late afternoon). Expert testimony established that Modes died from strangulation and that her DNA had been found on a mattress in Sanchez's apartment. In defense, Sanchez presented the testimony of Dr. Ronald K. Siegel, a psychopharmacologist, to the effect that methamphetamine users may suffer from "false beliefs" and hallucinations. (Although Sanchez told the police he had used methamphetamine the previous evening, he told Dr. Siegel he had smoked marijuana, had "two lines" of methamphetamine, and drank some beer about 15 to 20 minutes before Modes entered his apartment.) As noted at the outset, Sanchez was convicted of second degree murder.

DISCUSSION

I.

Sanchez contends there was sufficient evidence for the jury to find that he was unconscious at the time of the murder and that the trial court accordingly had a *sua sponte* duty to instruct the jury according to CALJIC No. 8.47.² We disagree.

² CALJIC No. 8.47 (2006 ed.) provided: "If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without an intent to kill and without malice aforethought, the crime is involuntary manslaughter. [¶] This law applies to persons who are not conscious of acting but who perform acts or motions while in that mental state. The condition of being unconscious does not require an incapacity to move or to act. [¶] When a

First, there is no real issue about whether the trial court had a *sua sponte* duty to give this instruction. To the contrary, it is clear (from the transcript of the jury instruction conference) that the court understood it was defense counsel's intent to argue, based on his expert's testimony, that Sanchez was hallucinating at the time of the crime, not that he was unconscious. Consistent with Sanchez's theory of the case, the court instructed the jury on first and second degree murder and that, if "the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation" (CALJIC No. 8.73.1); voluntary manslaughter based on an actual but unreasonable belief in the necessity to defend against imminent peril (CALJIC No. 8.40); involuntary manslaughter based upon provocation insufficient to reduce the homicide to manslaughter (CALJIC Nos. 8.42, 8.45); and voluntary intoxication as it may be relevant to the intent required for the various types of homicide (CALJIC Nos. 4.21.1, 4.22). In short, Sanchez got what he asked for and no more was required. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Flannel* (1979) 25 Cal.3d 668, 685.)

person voluntarily induces [his] own intoxication to the point of unconsciousness, [he] assumes the risk that while unconscious [he] will commit acts dangerous to human life or safety. Under those circumstances, the law implies criminal negligence."

Second, there is no evidence that Sanchez was unconscious within the meaning of CALJIC No. 8.47, and thus there was no *sua sponte* obligation to so instruct the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422-424; *People v. Saile*, *supra*, 54 Cal.3d at pp. 1120-1121; *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432-1433.) Indeed, even Sanchez's own statement to the police did not go that far -- he said only that he did not know what happened, that it was "like the devil was in [him]." An inability to remember does not establish the defense of unconsciousness. (*People v. Coston* (1947) 82 Cal.App.2d 23, 40; *People v. Boyes* (1983) 149 Cal.App.3d 812, 818.)³

There was no instructional error.

II.

At the sentencing hearing, the trial court ordered Sanchez to pay \$10,000 to the Restitution Fund to reimburse it for amounts already paid for Modes's funeral and assistance to her family, plus a \$200 restitution fine (which the court then struck because it had ordered the \$10,000 payment to the Fund), plus a \$20 security fee, plus a \$200 parole revocation fine (which was stayed). Sanchez contends the \$10,000 order cannot stand because there is no evidence to support it. We agree.

³ Sanchez cites *People v. Webber* (1991) 228 Cal.App.3d 1146, 1158, 1163, pointing out that the same defense expert testified in both cases (in *Webber* and in Sanchez's case) and opined in both cases that the defendants were hallucinating at the time of their crimes. The coincidence is interesting but irrelevant because the defendant in *Webber* did not claim he was *unconscious*, only that he was entitled to an involuntary manslaughter conviction because there was evidence that he was *hallucinating*. Sanchez's jury was instructed on involuntary manslaughter.

When the trial court inquired about restitution, the prosecutor said the Restitution Fund had paid the funeral expenses and that there were ongoing expenses as well, but no evidence of any kind was presented -- indeed, the prosecutor asked to set the matter for "a brief restitution hearing, and [Sanchez] could waive his appearance." Sanchez responded, "Whatever you want. I don't care." But no hearing was scheduled or held, and the court simply ordered Sanchez to pay \$10,000 to the Fund.⁴ Because section 1202.4, subdivision (f), requires the court to establish the amount of restitution "based on the amount of loss claimed by the victim," it is clear that the order cannot stand.

Indeed, subdivision (f)(4)(B) of section 1202.4 provides that when a restitution order requires payment to the Restitution Fund, "[t]he amount of assistance provided by the Restitution Fund *shall* be established by copies of bills submitted to [the Fund] reflecting the amount paid by the [Fund] and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation" (Emphasis added.) Here the court selected the \$10,000 amount simply because it believed, mistakenly, that it was the maximum

⁴ We summarily reject the Attorney General's contention that the issue was forfeited by Sanchez's failure to object at the time the order was made. Because the prosecutor and the court addressed their comments to Sanchez rather than defense counsel, his response must be construed narrowly to mean only what he said -- that is, that he did not care whether he was present for a hearing that would be held at some point in the future. Although defense counsel should have objected, we refuse to penalize Sanchez for a problem created by the prosecutor, not defense counsel. And while we agree with the Attorney General's assertion that the trial court has discretion to fix the amount of a restitution order *below* the amount actually spent (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751), that point is irrelevant because the order here is for a purely speculative amount. (§ 1202.4, subd. (f).) There is not a scintilla of evidence in the record about the cost of the funeral or the nature or extent of the other services provided to the victim's family.

amount it could order and assumed, without any basis in fact, that the victim's family had received at least that amount.

On remand, the People can decide whether to pursue the restitution order, in which event a hearing must be held; if the People abandon this issue, the \$200 restitution fine shall be reinstated.⁵

⁵ We reject Sanchez's contention that the \$200 fine cannot be reinstated because the People did not object "to the failure to impose a restitution fine." (See *People v. Tillman* (2000) 22 Cal.4th 300.) It appears the court struck the fine because it considered the \$10,000 restitution order sufficient; for that reason, the prosecutor's failure to object does not bar reinstatement of the \$200 fine if the People abandon the claim for reimbursement to the Fund.

DISPOSITION

The \$10,000 payment to the Restitution Fund is vacated, and the cause is remanded to the trial court with directions to determine whether the People intend to pursue the restitution issue; if so, the court shall set a hearing and thereafter make such other orders as are necessary and appropriate; if not, the court shall forthwith reinstate the \$200 restitution fine (§ 1202.4, subd. (b)); and in either event the trial court shall issue a corrected abstract of judgment (after conforming the amounts of all the fines to the orders actually made) and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.